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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6650

RICHARD BROWN,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT

I. PETITIONER'S FIRST STATEMENT MUST BE SUPPRESSED AS THE PRODUCT OF PETITIONER'S UNCONSTITUTIONAL ARREST AND ILLEGAL DETENTION. 9

A. The Illinois *Per Se Attenuation* Rule Totally Ignores The Officer's Flagrant And Abusive Violations Of Petitioner's 4th And 14th Amendment Rights. 9

B. Petitioner's Unconstitutional Arrest And Detention Under Flagrant And Abusive Circumstances Negate Any Idea Of "Free Will." Petitioner's Fourth, Fifth, And Fourteenth Amendment Rights Were Inexcusably Violated. 12

II. PETITIONER'S SECOND STATEMENT MUST BE SUPPRESSED AS THE PRCDUCT OF PETITIONER'S FIRST STATEMENT, UNCONSTITUTIONAL ARREST, AND ILLEGAL DETENTION. 25

III. EXCLUSION OF PETITIONER'S TWO STATIONHOUSE STATEMENTS IS THE ONLY EFFECTIVE SANCTION FOR THE VARIOUS CONSTITUTIONAL VIOLATIONS WHICH OCCURRED. PRESENTLY AVAILABLE ALTERNATIVE REMEDIES ARE ILLUSORY, NOT REAL 28

CONCLUSION 35

Page

Cases:

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 407 (1971) 28, 29

Boyd v. United States, 116 U.S. 616 13

Brown v. Mississippi, 297 U.S. 278 (1936) 11, 12

Darwin v. Connecticut, 391 U.S. 346 (1968) 27

Davis v. Mississippi, 394 U.S. 721 (1969) 16

Draper v. United States, 358 U.S. 307 (1959) 15

Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972) 34

Elkins v. United States, 364 U.S. 206 15

Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973) 33

Henry v. United States, 361 U.S. 98 (1959) 15

Ker v. California, 374 U.S. 23 (1963) 17

Killough v. United States, 315 F.2d (D.C. Cir. 1962) 27

Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) 33

Lewis v. Kugler, 446 F.2d 1343 (3rd Cir. 1971) 32-33

Lynumn v. Illinois, 372 U.S. 528 (1963) 22

Mapp v. Ohio, 367 U.S. 643 (1961) 13

Marbury v. Madison, 9 U.S. (5 Cranch) 137 (1803) 28

Michigan v. Tucker, _____U.S. _____, 41 L.Ed.2d 182, 192 (1974) 11

Miranda v. Arizona, 348 U.S. 436 (1966) ..... *passim*

Monroe v. Pape, 365 U.S. 167 (1961) 33

Moor v. County of Alameda, 411 U.S. 693 (1973) 33

Morales v. New York, 396 U.S. 102 (1969) 18

Nardone v. United States, 308 U.S. 338 (1939) 12

Nueslein v. District of Columbia, 115 F.2d 690 14

Rea v. United States, 350 U.S. 214 14

Page

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 12, 14

Spano v. New York, 360 U.S. 315 (1959) 22

Traub v. Connecticut, 374 U.S. 493 (1963) 17

Weeks v. United States, 232 U.S. 383 (1914) 12, 13

Westover v. United States, 384 U.S. 436 (1966) 11

Wong Sun v. United States, 371 U.S. 471 (1963) .... *passim*

Constitution of the United States:

Fourth Amendment 2, 14

Fifth Amendment 2-3

Fourteenth Amendment 3, 13, 14

Texts:

Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 Va.L.Rev. 621 (1955) 31-32

Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L.Rev. 493, 494 (1955) 32, 34

Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 48 J. Crim. L., C&P.S. 160 (1967) 30

Little, *The Exclusionary Rule of Evidence As A Means of Enforcing Fourth Amendment Morality on Police*, 3 Ind. Legal Forum 375, 387-389 (1969-70) 30, 32

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 665, 722-723 (1970) . 29, 30, 31

Reich, *Police Questioning of Law Abiding Citizens*, 75 Yale L.J. 1161, 1169 (1966) 28

Spitto, *An Empirical Study of the Exclusionary Rule: From Its Origins to its Alternatives*, 114 (unpub. research pap., U. of Chi. L. Sch., 1972) 31, 33

William O. Douglas, *Vagrancy and Arrest On Suspicion*, 70 Yale L.J. 1, 13 (1960) 24

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 56 Ill. 2d 312, 307 N.E.2d 356 (1974).

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on January 31, 1974. No petition for rehearing was filed. The petition for a writ of certiorari was filed on May 1, 1974, and was granted on October 21, 1974. Jurisdiction of this Court is conferred by 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

Whether *Wong Sun* dictates that petitioner's two statements are inadmissible as evidence in petitioner's trial, and more specifically: whether the Illinois Supreme Court was correct in ruling that the mere giving of *Miranda* rights by a policeman guilty of an unconstitutional and independently oppressive arrest and illegal detention dissipated the "taint" of such oppressive unconstitutional behavior and rendered such statements admissible as evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, . . .against unreasonable searches and seizures shall not be violated. . ."

Fifth Amendment to the Constitution of the United States:

> "No person . . . shall be compelled in a criminal case to be a witness against himself . . ."

Fourteenth Amendment to the Constitution of the United States:

> " . . . nor shall any State deprive any person of life, liberty or property without due process of law . . . "

STATEMENT OF THE CASE

Petitioner was tried before a jury in the Circuit Court of Cook County, Illinois and found guilty of the accountability-murder of Roger Corpus. The State's case against petitioner consisted mainly of two statements taken from him. The first, an oral statement[1], was taken by Officers Nolan and Lenz, the arresting officers. The second, an unsigned written statement, was elicited by an Assistant State's Attorney. Petitioner filed a pretrial motion to suppress both statements, challenging the constitutionality of his arrest and detention. A hearing was held, but the motion was denied. (R. 130)[2]

At trial, testimony was given by deceased's mother, brother, sister, and neighbor, all of whom lived in the

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[1] The oral statement was typed into a written statement, signed by petitioner, but not introduced into evidence because the *Miranda* warnings were insufficient. Officer Nolan repeated to the jury the oral statement.

[2] Record references (R. 1)-(R. 130) indicate the hearing on the motion to suppress. References (R. 292)-(R. 530) indicate the trial.

same building as the deceased but were not occurrence witnesses. Officers Nolan and Lenz testified, and petitioner's second (unsigned, written) statement was read to the jury. Petitioner did not take the stand.

Circumstances Of The Unlawful Arrest For Investigation And The Procurement Of Statements

Petitioner was arrested on May 13, 1968, for "investigation", (R. 59, 72, 410, 413) or "questioning" (R. 468) regarding the homicide of Roger Corpus. Officer Nolan testified that on May 13, acting pursuant to official police department orders, he and Officer Lenz proceeded to petitioner's apartment (R. 433), arriving between 4:30 and 5:00 p.m. (R. 434) The pair met a third detective at the apartment, Officer Wasmund, who remained outside, at street level, as the two entered the building. (R. 401)

Officer Nolan, a detective for five and one-half years (R. 431), and Officer Lenz, a member of the police force for fourteen years and a detective for twelve years (R. 3, 4), broke into petitioner's apartment upon finding no one home. Possessing neither a search or arrest warrant (R. 103) nor probable cause for arrest (Illinois Supreme Court Opinion, p.2), the two detectives searched the apartment (R. 21, 412) and laid in wait, concealed, for petitioner's return for three hours. (Opinion, p.1, R.434) When Petitioner arrived at approximately 7:45 p.m. (R. 4, 57) and began entering his apartment, Nolan and Lenz jumped out at him with drawn guns. (R. 19, 102, 103, 462) Petitioner, a Black man did not know at this time that his two white

assailants in street clothes were police officers. (R. 128) Officer Lenz told petitioner that he was under arrest. (R. 20, 71) Petitioner denied being Richard Brown. (R. 21, 72, 103)

The two arresting officers then handcuffed petitioner's hands behind his back (R. 104, 463), pushed him against a wall (R. 462), and searched his person. (R. 462)

Lenz first told petitioner the reason for his arrest while petitioner was being searched. (R. 23) The officers then immediately drove petitioner to the Maxwell Street Police Station. (R. 4) Approximately ten to twenty minutes elapsed between the time of petitioner's arrest and the arrival of the three men at the police station. (R. 5, 413) Petitioner testified at the suppression hearing that Officer Lenz stated to his sergeant, "Sarge, we have got him. We picked him up." (R. 104, 105) Lenz did not recall this conversation. (R. 25) The sergeant then directed the two officers to take petitioner inside an interrogation room. (R. 105) Although the record is unclear, petitioner was apparently kept handcuffed while in the interrogation room. Petitioner testified, without contradiction, that his hands were handcuffed behind his back when he first entered the police station (R. 104), and there is no testimony that the handcuffs were ever removed.

Once inside the interrogation room, petitioner soon (i.e., within a few minutes (R. 59)) began talking with and answering questions put by Officers Lenz and Nolan. First, Lenz gave petitioner what purported to be *Miranda* warnings. On direct examination, Lenz testified to the warnings supposedly given. However, these failed to include a warning that petitioner had the right to a

court-appointed counsel if he lacked sufficient funds to retain counsel. (R. 6) Cross-examination cured this defect, for Lenz there testified that petitioner was told of his right to court-appointed counsel. (R. 29)

In regard to waiver of the *Miranda* rights, Officer Lenz testified, on direct examination, petitioner indicated that he did not want an attorney present after being advised that he had a right to one. (R. 6) Yet, on cross-examination, Lenz stated that petitioner responded to the same question by saying, "he did not have an attorney." (R. 29) In further contrast, petitioner testified that although he was warned of his right to have an attorney present during the interrogation, Officer Lenz told him he did not need one. (R. 117)

Following *Miranda* warnings, Officer Lenz told petitioner that the police were aware of a pool room incident on 5th Avenue. Petitioner responded, "Oh, you know about that." Lenz also informed petitioner that the police had obtained a bullet from the ceiling of the pool room and sent it to their crime lab for comparison with bullets taken from the body of the deceased. Petitioner again responded, "Oh, you know about that too." Lenz then asked petitioner if he wanted to talk about the Roger Corpus homicide. Petitioner then proceeded to give a statement. (R. 30) Officer Nolan's testimony substantially corroborated Lenz's. (R. 78, 79)

Petitioner testified that Lenz told him that his help was essential because the bullets found in the pool room were the *same* as those found in the body of the deceased. Then, according to petitioner, Officer Lenz said, "All the arrows is (*sic.*) pointing directly at you," and petitioner responded that he did not kill anybody.

Lenz replied, "Well you going (*sic.*) to have to give me somebody who did." Petitioner then made the above noted statement. (R. 112), which was admitted into evidence through the testimony of Officer Nolan. (R. 447-453) Petitioner also testified that the officers told him that his fingerprints were found in the deceased's apartment. (R. 106) At trial the State stipulated that the bullet from the ceiling of the pool room could not be compared with the bullets in the body of the deceased, and that no fingerprints other than those of the deceased were found in the deceased's apartment. (R. 542, 543)

Petitioner then signed a typed statement which the State never introduced into evidence. Presumably, this was because it did not contain warnings that anything petitioner said would be used against him and that if he was without sufficient funds, a lawyer would be furnished upon his request. (R. 82-3) Officer Nolan testified at trial that petitioner said in his statement that he met Claggett at the apartment of the deceased, that Claggett shot the deceased, that petitioner tried unsuccessfully to prevent the shooting, and that Claggett ordered petitioner at gunpoint to tie deceased up, which he did. (R. 447-453) The officer's *incommunicado* interrogation of petitioner concluded at 8:45 p.m. (R. 64), approximately one hour after petitioner's unconstitutional arrest. The statement took approximately one-half hour. (R. 64) Petitioner testified that Officer Lenz told him immediately after his first statement that he "would have to help catch Jimmie [Claggett] in order to clear" himself. (R. 108-109) Officer Lenz corroborated the fact that leniency was discussed by testifying at the suppression hearing that

petitioner indicated that "he would like to turn State's evidence against Claggett." (R. 42)

At 9:30 p.m., the two arresting-interrogating officers took petitioner to look for Claggett. After an hour of unsuccessful driving, they drove petitioner to central police headquarters to look for a picture of Claggett. (R. 10-11) Although the officers knew that a night bond court was open at that hour in the same building, they did nothing to bring petitioner before a judge (R. 38), as required by Illinois law.

The three left central police headquarters at 11:00 p.m., and returned to the area where they thought Claggett could be found. On this occasion, petitioner pointed out Claggett on the street, and he was taken into custody. (R. 12) The four then returned to the Maxwell Street Station, arriving at 12:20 a.m., and petitioner was placed in the same interrogation room. (R. 13)

At 2:00 a.m., May 14, Assistant State's Attorney John Crilly arrived (R. 44), spoke to petitioner for one-half hour (R. 46), and took a second statement from petitioner in the presence of a court reporter. (R. 49-50) Crilly testified at the suppression hearing that Officer Nolan was also present. (R. 48) This statement, duly transcribed, contained *Miranda* warnings, but petitioner did not sign it. (R. 113) Interrogation ceased at 3:00 a.m. (R. 50) This second (unsigned) statement was admitted into evidence at petitioner's trial. (R. 510-529)

Petitioner was first allowed to make a phone call at 4:00 a.m., May 14, when he called his mother. (R. 567) No attorney was provided for petitioner until he was finally taken before a magistrate at about 9:30 that

same morning (R. 39), approximately 14 hours after his unconstitutional arrest. Until such time, petitioner had continuously and uninterruptedly been held in the officers' custody, alone and bereft of any personal support from counsel, relatives, friends, or anyone else.

SUMMARY OF ARGUMENT

Petitioner's two statements must be excluded because obtained as "tainted" unconstitutional by-products of petitioner's independently oppressive unconstitutional arrest and illegal detention. Petitioner's *Miranda* warnings were ineffective to dissipate such "taint." Petitioner's second statement must also be excluded as a "tainted" by-product of petitioner's first statement and because it was "come at" by intentionally unconstitutional police misconduct violative of petitioner's Fourth and Fourteenth Amendment Rights.

I.

PETITIONER'S FIRST STATEMENT MUST BE SUPPRESSED AS THE PRODUCT OF PETITIONER'S UNCONSTITUTIONAL ARREST AND ILLEGAL DETENTION.

A. The Illinois *Per Se Attenuation* Rule Totally Ignores The Officer's Flagrant And Abusive Violations Of Petitioner's 4th And 14th Amendment Rights.

Petitioner contended before the Supreme Court of Illinois that his first stationhouse statement should have

been suppressed as a fruit of the unconstitutional and independently oppressive illegality under *Wong Sun v. United States*, 371 U.S. 471 (1963). In rejecting this contention, the Supreme Court of Illinois reasoned that the mere giving of the *Miranda* warnings was sufficient to "purge the primary taint of that unlawful invasion." (Ill. Sup. Ct. Opinion, p.3) By choosing exclusively to focus on petitioner's *Miranda* warnings, the Illinois Court ignored all of the other circumstances surrounding petitioner's first statement—the flagrant and abusive police conduct, both in terms of bad faith and number of constitutional violations; the ambiguous purported waiver of *Miranda* rights; and the trickery by the police (i.e., the bullets matched and petitioner's fingerprints were found in deceased's apartment) linking petitioner to the crime.

Miranda v. Arizona, 384 U.S. 436 (1966), dealt with the protection constitutionally demanded for the privilege against self-incrimination when a citizen is subjected to custodial police interrogation and confesses.

Miranda extended constitutional protection to persons subjected to the inherent coerciveness of custodial interrogation. *Miranda* did not address itself to the additional coerciveness of an unconstitutional and independently oppressive arrest for "investigation" or of a subsequent illegal detention. The case at bar involves constitutional violations and other oppressions separate and apart from the inherent coerciveness of custodial interrogation. The Supreme Court of Illinois did not even consider the effect of these other circumstances including constitutional violations in holding that the petitioner's challenged statements were "sufficiently an

act of free will to purge the primary taint of the unlawful invasion." (Ill. Sup. Ct. Opinion, p. 3)

In *Westover v. United States*, 384 U.S. 436 (1966), this Court squarely held that other circumstances surrounding the confession can negate the protection normally afforded by *Miranda* warnings. Westover was given *Miranda* warnings by the F.B.I. before making a confession. In holding that his confession was improperly admitted at trial, this Court heavily stressed Westover's prior interrogation for long periods during a fourteen hour custodial detention by the Kansas City police. Since the F.B.I. *Miranda* warnings came, in effect, at the end of one long, continuous interrogation period, such warnings were held to be ineffective to protect Westover's constitutionally protected rights. *Westover* fairly holds that the more oppressive the prior and attendant circumstances surrounding the taking of the challenged custodial statement, the less the weight to which the warnings are constitutionally entitled. In petitioner's case, just as in *Westover*, they are entitled to little, if any weight, on the question of admissibility.

In *Michigan v. Tucker*, ____ U.S. ____, 41 L.Ed. 2d 182, 192 (1974), this Court recognized that *Miranda* plainly contemplates: "a defendant's statements might be excluded at trial despite their voluntary character under traditional principles." Indeed, this is *Miranda's* most basic point. Certainly, the giving of *Miranda* warnings in a case where actual physical torture was employed by the police (Cf. *Brown v. Mississippi*, 297 U.S. 278 (1936)) would not end this Court's inquiry and automatically require a holding that the confession is constitutionally admissible. In other words, the "taint" of an attendant or prior physical beating of the

accused by police simply could not be "purged" or cut-off by the reading of a *Miranda* card by a police officer participant in the beating. The unconstitutional acts committed by Officers Lenz and Nolan are the constitutional equivalent in the present case to the physical beating in *Brown*.

B. Petitioner's Unconstitutional Arrest And Illegal Detention Under Flagrant And Abusive Circumstances Negate Any Idea Of "Free Will." Petitioner's Fourth, Fifth, and Fourteenth Amendment Rights Were Inexcusably Violated.

Wong Sun was the first case to suppress a statement or confession of a defendant as the product of an unlawful arrest. The exclusion of James Wah Toy's statement logically followed from a long line of this Court's decisions.

In 1914, in an endeavor to protect the rights guaranteed by the Fourth Amendment, this Court adopted the exclusionary rule in the case of *Weeks v. United States*, 232 U.S. 383 (1914). In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), this Court first advanced the doctrine of "taint" or "fruit of the poisonous tree" in holding that all evidence gained from illegal government practices, directly and indirectly, was inadmissible, unless knowledge of the evidence was gained from an independent source. Twenty years later in *Nardone v. United States*, 308 U.S. 338 (1939), this Court reaffirmed the independent source doctrine of *Silverthorne* and coined the phrase "fruit of the poisonous tree." The Court then held that the

connection between the illegality and the evidence had become "so attenuated as to dissipate the taint." Almost fifty years after *Weeks*, after considerable experimentation among the courts and debate among the commentators, this Court, in *Mapp v. Ohio*, 367 U.S. 643 (1961), incorporated the exclusionary rule into the Due Process Clause of the Fourteenth Amendment.

In *Wong Sun v. United States*, 371 U.S. 471 (1963), federal agents illegally entered defendant Toy's living quarters and arrested him. Toy made statements implicating himself and Johnny Yee. Agents arrested Yee and seized narcotics which he said were obtained from Toy and Wong Sun. All three were arraigned and released on their own recognizances. Several days later, the suspects returned voluntarily and made written statements. This Court excluded the statements made by Toy in his bedroom as the product of the illegal arrest:

> "In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, *Boyd v. United States*, 116 U.S. 616, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. *Weeks v. United States*, 232 U.S. 383." 371 U.S. at 484

The Court also excluded the narcotics surrendered by Yee as the fruits of Toy's statement, and Toy's later written statement on other grounds. Wong Sun's post arraignment statement was held to be admissible since the connection between it and Wong Sun's illegal arrest had "become so attenuated as to dissipate the taint." at 371 U.S. 491.

Wong Sun's reasoning that the Fourth Amendment which compels suppression of physical evidence also compels suppression of oral statements was never challenged by Mr. Justice Clark's dissent, joined by Justices Harlan, Stewart, and White. Regarding Toy's conviction, the dissent disagreed only with the majority's conclusion that the federal agents had no probable cause to arrest Toy:

> "In view of this there is no 'poisonous tree' whose fruits we must evaluate, and Blackie's [Toy's] declaration at the time of the arrest and the narcotics found in Yee's possession are admissible in evidence." 371 U.S. at 503

The dissent did not take issue with the majority's application of the fruits doctrine (see *Silverthorne, supra*) in regard to oral statements. In the case at bar, Illinois has specifically held the police lacked probable cause to arrest petitioner.

Suppressing an oral statement which is the product of an arrest in violation of the Fourth and Fourteenth Amendments finds support in the policies of deterrence and judicial integrity underlying *Wong Sun's* exclusionary rule:

> "Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the fruit of official illegality than the more common tangible fruits of the unwarranted intrusion. See *Nueslein v. District of Columbia*, 115 F.2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, *Rea v. United States*, 350 U.S. 214, or of

> closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins v. United States*, 364 U.S. 206, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction." at 371 U.S. 485-86. (Footnote omitted)

A major disadvantage of the exclusionary rule is that competent, trustworthy evidence is often withheld from the trier of fact. Since in at least two respects verbal evidence is inherently less reliable than physical evidence, the suppression of verbal evidence is *more* justifiable.

First, since the probative value of verbal evidence depends upon the memory and credibility of the witness, it is inherently less reliable than physical evidence.[3] Second, since people do not always tell the truth, there exists no assurance that the oral statement itself is the truth. To put it in reverse: what better proof of the possession of a weapon is there than the weapon itself?

The illegality of an arrest is often the reason for excluding evidence. Indeed, when a search uncovers physical evidence during the course of an illegal arrest, that evidence is routinely suppressed as the tainted product of the arrest's illegality. (See *Henry v. United States*, 361 U.S. 98 (1959); *Draper v. United States*, 358 U.S. 307 (1959)).

Even physical evidence seized days after an illegal arrest has been excluded by this Court as a tainted

[3] A transcript or tape recording of the custodial interrogation could largely alleviate this problem (See *Wainwright v. City of New Orleans*, 392 U.S. 598, 604-607 (1968) (Mr. Chief Justice Warren dissenting from Order dismissing writ)).

product thereof. (*Davis v. Mississippi*, 394 U.S. 721 (1969)) In *Davis*, a rape occurred on December 2, 1965. On December 3, Davis was brought to the police station and released after being fingerprinted and routinely questioned. Between the 3rd and 7th, he was interrogated several times and exhibited several times to the victim for identification, which never occurred. On December 12, Davis was confined overnight in jail. On the 13th, he signed a statement. While still confined on the 14th, he was fingerprinted a second time. These prints were then matched with the prints taken from the window of the victim's home and introduced at trial. This Court suppressed the fingerprints as being the product of the illegal arrest. It did so, moreover, knowing that retrial would doubtless produce another conviction. The "imperative of judicial integrity" is at the very heart of *Davis*.

Davis is important here for yet another reason. Petitioner's case is *a fortiori* from that decision. If fingerprint evidence obtained 11 days after an original illegal arrest is constitutionally excludable under the Fourth Amendment as its tainted by-product, oral incrimination within hours following an unconstitutional and independently oppressive arrest at gunpoint, accompanied by illegal detention and *incommunicado* police station interrogation is *a fortiori* excludable on the same basis.

The Supreme Court of Illinois held both of petitioner's interrogation room statements admissible on the ground that the *Miranda* warnings:

> "[s]erved to break the causal connection between the illegal arrest and the giving of the statements, and that defendant's act in making the statements

> was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.' *Wong Sun v. United States*, 371 U.S. 471, at 486." Ill. Sup. Ct. Opinion, p. 3

This holding purports to apply the same test applied by this Court to Toy's bedroom statement and Sun's noncustodial statement after judicial release on his own recognizance. Certainly, petitioner's case is a far cry from Sun's statement in *Wong Sun* since petitioner was under continued police custody, without the benefit of a lawyer, relatives, or friends, from the time of his unconstitutional arrest.

The Government in *Wong Sun* argued that Toy's bedroom statement resulted from "an intervening act of free will." This Court disagreed:

> "This contention, however, takes insufficient account of the circumstances. Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping. He had been almost immediately handcuffed and arrested. Under such circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." (footnote omitted) 371 U.S. at 486

In *Traub v. Connecticut*, 374 U.S. 493 (1963), this Court, in a *per curiam* opinion, vacated the judgment of the Connecticut Supreme Court and remanded the case for further consideration in light of *Wong Sun* and *Ker v. California*, 374 U.S. 23 (1963). First, *Traub* applies *Wong Sun* to state proceedings. Second, since the Connecticut Supreme Court had already held that the confessions were voluntary, this Court's vacating and remanding can only mean one thing: that this Court

will more carefully scrutinize a confession elicited during the course of custodial interrogation following an unconstitutional arrest. In other words, even if a confession is voluntary, the same confession may be suppressed under the "free will" test. (See *Morales v. New York*, 396 U.S. 102 (1969))

Petitioner's initial statement was not an act of "free will." The causal connection between such statement and the egregiously unconstitutional acts of the police at petitioner's apartment was not "so attenuated as to dissipate the taint." *Wong Sun*, at p. 491. Indeed, the illegal taint was a continuing one, growing progressively more exploitive with each additional minute of petitioner's *incommunicado* police station interrogation. On May 13, 1968, a little before 8:00 p.m., petitioner entered his own home. Imagine his terror when two white male strangers[4] in street clothes suddenly leaped out without warning, their drawn guns pointing directly at him. (R. 19, 102, 103, 462) The two strangers handcuffed petitioner's hands behind his back (R. 104, 463), shoved him up against the wall (R. 462), and searched him. (R. 21, 462) Not until the police searched petitioner did Officer Lenz tell him he was under arrest for murder. (R. 23) Petitioner denied being Richard Brown. (R. 23) The two police officers then hurried petitioner off to a police station interrogation room.

The arrest was without probable cause (Ill. Sup. Ct. Opinion, p. 2) and thus violated petitioner's Fourth and Fourteenth Amendment rights. As if the unconstitutional and independently oppressive arrest was not

[4]The two police officers were in plain clothes and failed to announce their agency at this first encounter. (R. 128)

enough, the police continued illegally to detain petitioner for over thirteen hours before bringing him before a judge, in violation of the Illinois prompt arraignment law. (Ill. Rev. Stat. ch. 38, sect. 109-1 (a))[5] Moreover, Officer Lenz testified that he was aware that a night bond court was both open for business and conveniently at hand. (R. 38)

The same two officers, Lenz and Nolan, who had only minutes before unconstitutionally arrested petitioner, entered a small interrogation room with petitioner. (R. 105)[6] Lenz, who only minutes before was pointing a snubnosed .38 at petitioner's head (R. 102), gave petitioner warning of his constitutional rights under *Miranda*.

Miranda requires police to advise the accused he has "not merely a right to consult with counsel prior to

[5]Ill. Rev. Stat. ch. 38, Sec. 109-1 (a) provides:

> A person arrested without a warrant shall be taken *without unnecessary delay* before the nearest and most accessible judge in that county, and a charge be filed.

(b) provides:

> The judge shall:
>
> (1) Inform the defendant of the charge against him and shall provide him a copy of the charge.
>
> (2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney of this State or represent him. . . (Emphasis Added)

[6]Although the record is unclear, petitioner was apparently kept handcuffed while in the interrogation room. Petitioner testified, without contradiction, that his hands were handcuffed behind his back when he first entered the police station (R. 104), and there is no testimony that the handcuffs were ever removed.

questioning, but also to have counsel present during any questioning." 384 U.S. at 470. *Miranda* also clearly specifies on whom the burden of demonstrating waiver rests:

> "...a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475

The issue of whether petitioner effectively waived his rights under *Miranda* is not before this Court. A narrower issue is: whether petitioner's purported waiver of constitutional rights effectively attenuated the causal connection between petitioner's unconstitutional arrest and illegal detention and his initial resulting statement.

Under these circumstances, petitioner's purported waiver of his *Miranda* rights was at most vague, at the least inadequate. Officer Lenz testified on cross-examination at the suppression hearing that petitioner stated "he did not have an attorney" when asked whether he wished to have an attorney present at that time. (R. 29) Petitioner testified on cross-examination at the same hearing that, though warned of his right to have an attorney present during the interrogation, Lenz told him he did not need one. (R. 117) Petitioner, understandably frightened by the oppressive series of unconstitutional strong arm tactics of the police, was obviously confused concerning his right to have a free attorney present during interrogation. Petitioner had only an eighth grade education (R. 115) and only one previous encounter with police, a misdemeanor conviction. (R. 640) Lenz should have known of petitioner's misunderstanding from petitioner's above quoted statement, and acted to correct it. Officer Lenz instead chose to do nothing. Instead of supporting the Supreme Court of Illinois' conclusion of attenuation, this vague, inadequate, purported waiver of *Miranda* rights clearly shows that no attenuation exists.

Officers Nolan and Lenz further acted to overbear petitioner's free will and vitiate whatever protection remained from the *Miranda* warnings by deceiving petitioner about the existence of certain evidence. Officer Lenz's account was as follows:

> "I informed Mr. Brown that we were aware of an incident that had taken place in a pool room on 5th Avenue, on, as I recall, the 3rd – approximately the 5th of May, 1968. His answer was, 'Oh, you know about that.' I also informed him that we had obtained a bullet from the ceiling of this pool room and that this bullet had been taken to our crime lab to be compared with bullets taken from Roger Corpus' body. [Continuing] His answer to this was, 'Oh, you know that too.' I then asked Mr. Brown if he wished to tell us what he knew about Roger Corpus' homicide. He informed us that he did." (R. 30-31)

Petitioner then immediately gave his first statement. (R. 33) Officer Nolan's testimony substantially corroborated Lenz. (R. 78, 79)

Petitioner's testimonial account of the event was not substantially different:

> "Well, I can recall when I got down to the station Officer Lenz was telling me that I was not going to be charged with the pool room. But he told me that I would have to help him, he said, because the bullets he found in the pool room were the same in the body. He said, 'All the arrows is (*sic.*) pointing directly at you.' I told him then that I

> didn't kill anybody. Then he said, 'Well, you going (*sic.*) to have to give me somebody who did.' And this is when I told him about Jimmie Claggett . . . " (R. 112)

The officers' interrogation, trickery, and deceit in telling petitioner that his fingerprints were found in deceased's apartment and letting him think that the pool hall ceiling bullet matched those found in deceased's body was an obvious attempt to overbear such "free will" as petitioner might at this point have had left. Bereft of counsel and friends, held *incommunicado* by police officers apparently desperate enough to do anything, such police trickery on material evidence points was clearly calculated to destroy every remaining vestige of petitioner's "free will" and promptly to induce him to waive his constitutional rights of silence and to representation by counsel. In any event, petitioner's waiver of rights, or purported waiver, followed immediately upon the heels of the police practices in question. (Cf. *Spano v. New York*, 360 U.S. 315 (1959); *Lynumn v. Illinois*, 372 U.S. 528 (1963))

The lapse of time between petitioner's flagrantly unconstitutional arrest and the giving of his first statement does not support an attenuation finding for several reasons. First, the time interval in question was short. Officer Lenz testified at the suppression hearing that the trip from petitioner's home to the police station took approximately 20 minutes (R. 5), shortening this at trial to 10-15 minutes. (R. 5, 413) Petitioner was apparently taken to the interrogation room immediately upon arrival at the police station. (R. 105) In sum, petitioner began making his first statement only minutes after his ride to the station.

Second, since the police effected the unconstitutional arrest in a frightening and intimidating manner, the taint continued into the interrogation room.

Third, the same arresting-interrogating officers diffused the effect of petitioner's *Miranda* warnings by the use of trickery and deceit. Petitioner was thus deprived of the protection of constitutional rights to which he was clearly entitled had he only been *constitutionally* arrested and *lawfully* detained. (See *Miranda v. Arizona*, 384 U.S. 436 (1966))

Fourth, the fact that petitioner did not give a statement until after his unconstitutional arrest is no reason to conclude that he exercised his "free will" minutes later while being interrogated *incommunicado*. Petitioner was at the mercy of the arresting officers from the time of his unconstitutional arrest. The officers elected not to interrogate petitioner concerning the offense at his apartment or during the ride to the police station. (R. 24, 73-75, 103-104) Petitioner's interrogation did not begin until he was placed in the small interrogation room. Once inside the room, the officers first attempted to exploit their arrest for "investigation." Under *Wong Sun*, no attenuation exists:

> "Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by *exploitation of that illegality* or instead by means sufficiently distinguishable to be purged of the primary taint.' " (Emphasis Added) 371 U.S. at 488

Finally, and perhaps most importantly, the arrest was the most reprehensible and pernicious of all unconstitutional arrests, one for "investigation" or

"questioning." The officers testified both at the suppression hearing and at trial that petitioner was arrested for "investigation" (R. 59, 72, 410, 413) and for "questioning." (R. 468)

Petitioner's case is *a fortiori* from *Wong Sun* since that case did not involve an arrest for "investigation" or "questioning":

> "Police must make out part of their case at least before the citizen is arrested. We do not permit the practice engaged in in some lands of allowing arrests on suspicion or at the caprice of the police, so that long interrogation can follow with the hope it will make out the necessary case that justifies the arrest. Under our system the arrest is warranted not by what the police discover afterwards but by what they knew at the time."
>
> William O. Douglas, *Vagrancy and Arrest On Suspicion*, 70 Yale L.J. 1, 13 (1960).

Second, Toy incriminated himself in his bedroom in the company of his family, not in jail in response to *incommunicado* interrogation by the police. Finally, in *Wong Sun*, the treasury agents unlawfully broke into Toy's laundry, not to question and/or to jail Toy for the purpose of questioning, but to search for narcotics. Toy's oral incrimination of himself in his bedroom was certainly not planned by the agents; it may fairly even be viewed as a wholly unexpected by-product of their illegal presence. In petitioner's case, in contrast, Officers Lenz and Nolan acted premeditatedly, designedly, and deliberately from the beginning to obtain petitioner's statement.

II.

PETITIONER'S SECOND STATEMENT MUST BE SUPPRESSED AS THE PRODUCT OF PETITIONER'S FIRST STATEMENT, UNCONSTITUTIONAL ARREST, AND ILLEGAL DETENTION.

Petitioner testified that Officer Lenz told him immediately after his first statement that he "would have to help catch Jimmie [Claggett] in order to clear" himself. (R. 108-109) Petitioner further testified on cross-examination at the suppression hearing:

> ASSISTANT STATE'S ATTORNEY: Q. Were you – what type of leniency were you promised by the detectives?
>
> PETITIONER: A. Well –
>
> ASSISTANT STATE'S ATTORNEY: Q. Said you would go free? Is that what they told you?
>
> PETITIONER: A. No, Officer Lenz told me that I would be a State witness in this case. And he also told me that when I got up here that it would be a deal made between the State's Attorney and the Public Defender. (R. 120)

Officer Lenz corroborated the fact that leniency was discussed by testifying at the suppression hearing that petitioner indicated that "he would like to turn State's evidence against Claggett." (R. 42)

Petitioner then fully co-operated with Officers Lenz and Nolan in attempting to find Claggett. After an hour of unsuccessful driving around, the three returned to central police headquarters. (R. 10-11) According to Nolan, petitioner was eager to resume the search, petitioner saying "let's try again to see if we could find

Claggett." (R. 454) Officers Lenz and Nolan, accompanied by petitioner, then resumed their search. Petitioner eventually pointed out Claggett on the street, and the officers took Claggett into custody. (R. 12)

Upon returning to the Maxwell Street Station, petitioner was placed in the same interrogation room. (R. 13) Lenz and Nolan called Assistant State's Attorney Crilly who arrived at 2:00 a.m., for the purpose of procuring a statement. After talking to Officer Lenz, Crilly interrogated defendant for one-half hour (R. 45), while the two were alone in the interrogation room. The record is silent as to the substance of the interrogation. Then, in the presence of a court reporter and Officer Nolan (R. 48), Assistant State's Attorney Crilly procured a statement. The second statement was substantially the same as the first.

Petitioner's "free will" was already overborn by the two officers by the time he made the first statement (See Argument I). Officers Lenz and Nolan continued to exploit the illegality of the unconstitutional arrest and illegal detention by discussing leniency with petitioner. From the time of petitioner's first statement, he fully co-operated with the officers in attempting to locate Claggett, in suggesting a resumption in the search, and in eventually pointing out Claggett on the street. The police were playing on petitioner's expressed hopes for leniency by using him to lead them to Claggett.

After Claggett was under arrest, Officers Lenz and Nolan shifted their focus to the procurement of yet another statement from petitioner. Officer Nolan was conspicuously present in the interrogation room when Assistant State's Attorney Crilly interrogated petitioner

and procured the second statement. Petitioner understandably co-operated with Crilly in giving a statement which was substantially the same as his statement already given to Nolan only several hours before.

Under *Wong Sun*, this second statement must be excluded:

> "Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by *exploitation of that illegality* or instead by means sufficiently distinguishable to be purged of the primary taint.'" (Emphasis Added) 371 U.S. at 488

Alternatively, the second statement must be excluded because of the State's inability to sustain the burden of proving that the second statement was not the product of unconstitutional illegality (See *Wong Sun*), but also that it was not directly produced by the existence of the earlier statement. (See *Darwin v. Connecticut*, 391 U.S. 346 (1968), Harlan, J. concurring in judgment; *Killough v. United States*, 315 F.2d 241 (D.C. Cir. 1962), Wright, J., concurring in judgment) The accused may well think he has little to lose by repeating the first statement. In the case at bar, petitioner had no meaningful legal choice. He had to talk. (See *Darwin v. Connecticut*, Harlan, J. concurring in judgment)

III.

EXCLUSION OF PETITIONER'S TWO STATIONHOUSE STATEMENTS IS THE ONLY EFFECTIVE SANCTION FOR THE VARIOUS CONSTITUTIONAL VIOLATIONS WHICH OCCURRED. PRESENTLY AVAILABLE ALTERNATIVE REMEDIES ARE ILLUSORY, NOT REAL.

It is mostly a Constitution this Court sits to expound, *Marbury v. Madison*, 9 U.S. (5 Cranch) 137 (1803), and nowhere is that function more exhalted and ennobling than in the explication of "[c]onstitutional rights that [normally] must be defended, if at all, on a lonely street, on a highway at night, in a police station or before a justice of the peace." Reich, *Police Questioning of Law Abiding Citizens*, 75 Yale L.J. 1161, 1169 (1966). Such rights, primarily Fourth Amendment rights, thus frequently abandoned because of fear of police or other official reprisal or left to default, "are always in trouble." *Ibid.* This is one reason why "the judiciary [and so, ultimately, this Court] has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 407 (1971) (Harlan, J. concurring in judgment). Constitutional rights like those first typically asserted in stately appellate courtrooms usually in any event remain healthy and vibrant, sometimes despite themselves.

Another reason underlying special judicial attention to the vindication of Fourth Amendment interests is that they embrace freedoms from seizure or search of person or property without judicial warrant or probable

cause, from judicially unauthorized detention without bail with attendant overreaching police custodial *incommunicado* interrogation and from the *de facto* suspension of the Great Writ. These freedoms, more than others, distinguish us from the police state and let us breathe free.

For reasons heretofore assigned, it is clear that the only effective sanction for the unconstitutional and other oppressive police misbehavior in the case at bar is the exclusion at trial of petitioner's two statements made in response to *incommunicado* stationhouse interrogation following petitioner's independently oppressive and unconstitutional arrest. Moreover, it is submitted that the affirmative case for excluding such statements is very good indeed.

The "negative" case for excluding petitioner's two statements is equally impressive. There is simply no other even partially meaningful and effective sanction or remedy to redress the several serious violations of petitioner's protected rights which occurred. As noted above, even some who on reasoned principle and practical grounds oppose the continued exclusion at criminal trials of *physical evidence* seized in violation of the Fourth Amendment take a different view of oral incrimination oppressively extracted from a suspect under color of law at the jail, e.g., Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 665, 722-723 (1970) and authorities there cited, and stoutly oppose jettisoning *Mapp* unless and until viable alternative sanctions are developed. E.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411, 422-427 (1971) (Mr. Chief Justice Burger dissenting). As stated by Professor Oaks:

"If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. . . .The advantage of. . . (*Mapp's*) exclusionary rule–entirely apart from any direct deterrent effect–is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force. . . of law." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. of Chi L. Rev. 665, 776 (1970).

In cases such as petitioner's, involving inherently oppressive jailhouse incrimination pursuant to a deliberately unconstitutional arrest, it also effectively deters.

Existing sanctions (other than the exclusionary rule) for redressing Fourth Amendment violations may be disposed of briefly. Internal police disciplinary actions against policemen guilty of unreasonable searches and seizures are virtually unheard of. E.g., Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 665, 717, 726-729 (1970); Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 48 J. Crim. L., C. & P.S. 160 (1967); Little, *The Exclusionary Rule of Evidence As A Means of Enforcing Fourth Amendment Morality on Police*, 3 Ind. Legal Forum 375, 387-389 (1969-70).

The Chicago Police Department is typical. Oaks reports a study in which a University of Chicago law student examined the docket books of the federal

district court in Chicago for the years 1960-1967 to obtain a sample of 35 civil rights damage actions in which the City of Chicago or the police superintendent or department was originally joined as a co-defendant. The plaintiffs prevailed in 18 of these cases (3 by jury trial and 15 by settlement or bench trial), and obtained judgments totaling $126,000. The City of Chicago paid the judgments under state law, "*but not one of the 18 officers who had been found in the wrong was disciplined by the Police Department, not even by reprimand.*" Oaks, *supra* at 717, n. 145. (Emphasis added).

Again, a recent empirical study on file at the University of Chicago Law School concludes that the Chicago Police Department "does not look on such incidents [as unconstitutional arrests, searches and seizures] as proper circumstances for discipline." *An Empircial Study of the Exclusionary Rule: From Its Origins to its Alternatives*, 114 (unpub. research pap., U. of Chi. L. Sch., 1972). "In the area of noncorrupt police practices, police disciplinary procedures mainly concentrate on [physical] brutality." *Ibid*. Moreover, if there *ever was* a case of a Chicago police officer being disciplined for violating a citizen's Fourth Amendment rights, one could only learn of it accidentally or *sub rosa* since the Department refuses to make public an intelligible breakdown of its internal disciplinary statistics. *Id*., at 114, n. 244.

Criminal prosecution of offending police officers is almost as rare, if not more rare, than police policing themselves. E.g., Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 Va. L. Rev. 621

(1955); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493, 494 (1955). As stated by Little:

> "Criminal sanctions are ineffective, first, because citizens seldom complain to the prosecutor over police violations of the Fourth Amendment. Many injured individuals, whether innocent or guilty of a particular crime, are people who are in frequent contact with and thus have a continuous relationship with the police. They do not want to cause the police trouble for fear the police will cause trouble, in the future, for them... Secondly, criminal legislation is rendered impotent because prosecutors usually do not prosecute police unless their conduct is corrupt or publicly shocking, which is not the normal search and seizure... Thirdly, if an action is brought for a more ordinary offense, the verdict is likely to be 'not guilty.' Quasi quantitative studies indicate that many trial judges, like prosecutors, do not favor criminal police sanction." (Citing studies). Little, *The Exclusionary Rule of Evidence As A Means of Enforcing Fourth Amendment Morality on Police*, 3 Ind. Legal Forum 375, 390-1 (1969-70).

Other than the so-called "ombudsman" approach, foreign to American experience and patently inadequate to the task unless greatly modified, and the Civilian Police Review Board, an institution which has never worked anywhere it has been tried, the sole remaining remedy is the damage action in tort. Petitioner's counsel was unable to unearth even one case where State injunctive relief was granted against police officer violations of the Fourth Amendment and the scope of available federal injunctive relief, sometimes granted, is extremely narrow. E.g., *Lewis v. Kugler*, 446 F.2d 134?

(3d Cir. 1971); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) and cases therein cited.

Tort damage actions in this area are ineffectual for many reasons. Thus the States are immune from suit under the Eleventh Amendment as judicially construed. *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973). Municipalities are likewise typically immune under state law and are clearly immune, along with counties, under the provisions of the Federal Civil Rights Act. *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961). There is, in a word, nobody available to satisfy judgments. It is an understatement to say that the offending police officers are themselves without funds. While some bonds of some supervisory policemen cover their subordinates in this area, this is not generally true and the superior officers themselves are protected from liability in all but the most extreme cases by a doctrine of qualified immunity.

Moreover, as one writer empirically studying the effectiveness of the tort remedy in Illinois concluded:

> "Suits against police for tort remedies seem to take a long time, a lot of money, and a bright lawyer..." Spitto, *An Empirical Study of the Exclusionary Rule: From Its Origins to Its Alternatives*, 110, n. 232 (unpub. research pap., U. of Chi. L. Sch., 1972).

The situation is enough to deter all but the most persistent and/or mad. The tort action likewise raises serious problems under the Equal Protection Clause, and there is, in any event, something obnoxious about the notion that the State, by paying money, can effectively suspend Fourth Amendment guarantees.

The plight of citizens convicted of crime and jailed because police violated their Fourth Amendment rights is pitiable. In some states, of course, where civil death doctrine prevails, any rights they might have are suspended during the period of their incarceration. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955). Apart from this, however, the prospects of recovery are so bleak that not one such lawsuit has ever reached an appellate court, if, indeed, one has ever even been filed. The case most nearly in point is *Duncan v. Nelson*, 466 F.2d 939 (7th Cir. 1972). Plaintiff Duncan served 8 years in the Illinois State Penitentiary before his conviction was set aside by the Illinois Supreme Court on "involuntariness" grounds. Duncan was acquitted on retrial, in part, certainly, because Illinois could no longer use his confession. The Court of Appeals refused to permit Duncan to recover damages under the Federal Civil Rights Act or otherwise for the period of his incarceration. Since this was the gist of the lawsuit, the fact that the Court remanded for a small award on other grounds is irrelevant. The ultimate recovery, if any, could hardly even have covered costs, let alone attorney fees.

The facts of *Duncan* speak very loudly and eloquently. The only effective remedy to redress the several violations of petitioner's constitutional rights is for this Court to exclude his two statements made in the jailhouse, to reverse and to remand this cause to the Supreme Court of Illinois.

CONCLUSION

Petitioner prays that the judgment of the court below be reversed.

Respectfully submitted,

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